IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.133 OF 2005

...

Jayesh M. Gandhi & Ors. ...Petitioners

v/s.

Yogendra N. Thakkar & Ors. ...Respondents

...

Mr.K.D.Parikh with Ms.Alphana Ghone i/b Kanga & Co. for the Petitioners.

Respondent No.1 in person.

...

CORAM: D.K.DESHMUKH, J.

DATED: 25TH OCTOBER,2005

P.C.:

1. By this petition the Petitioners challenge the award dated 16-12-2004. The facts that are material

and relevant for deciding this petition are that admittedly in a contract between the parties there is an arbitration clause. That arbitration clause reads as under:-

> "All dispute and questions in connection with the Partnership or this Deed arising between Partners or their representatives shall be referred to Mr.Arun Jaswantlal of Matubhai Jamietram, Attorneys, as sole Arbitrator and in case he is not available or declines to act or resigns, then to a single Arbitrator if the partners agree upon one otherwise to the Arbitrators to be appointed by each party to the difference in accordance with the provision of the Arbitration and Conciliation Act, 1996 or any statutory modification thereof."

Admitted position is that there were nine partners. The named arbitrator did not act as an arbitrator. Nine partners did not agree to the sole arbitrator, therefore, each partner appointed his own nominee on the arbitral tribunal. Thus, the arbitral tribunal

consisting of nine arbitrators came to be constituted. One Mr.F.S.Broacha was an arbitrator appointed by the Respondent No.2 Mr.M.N.Thakkar. He resigned from the arbitral tribunal on 5th April, 2002. One Mr.Bhupendra Shah was appointed as an arbitrator by the Respondent No.3 Mr.B.L.Bhanu. He resigned on 18th April, 2002. Respondent No.1 had appointed Mr.Deepak Sukhija. He resigned on 3rd July, 2002. Respondent No.1 appointed one Mr.Gautam Ashra, a gentleman who has made the award which is impugned in this petition, as his nominee on the arbitral tribunal. On 1-7-2002, the Respondent No.1 addressed a letter to seven arbitrators, including his nominee on the arbitral tribunal Mr.Deepak Sukhija that they have failed to act and therefore their mandate as arbitrator stands terminated under Section 14(1)(a) of the Act. It appears that within two days of this letter the nominee of the Respondent No.1 Mr.Deepak Sukhija resigned and the Respondent No.1 filled in that vacancy by appointing Mr.Gautam Ashra. Though according to the Respondent No.1 the mandate of the arbitrator stood terminated, he did not move the court, in stead he addressed a letter dated 12-8-2002 to seven arbitrators requesting them to proceed with the matter. Same

request was made by letters dated 19-8-2002 and 16-9-2002. By letter dated 10th April, 2003 addressed to the Respondent No.1 by six arbitrators, excluding the nominee of the Respondent No.1 on the arbitral tribunal, pointing out that there are two vacancies on the arbitral tribunal and unless the arbitral tribunal is reconstituted by filling in those vacancies by making an application under Section 11 the arbitral tribunal can not function. There is no dispute that this letter was received by the Respondent No.1. But he did not take any steps to get the arbitral tribunal constituted. The Respondent No.1 on 9-9-2004 addressed a letter to nine arbitrators, including the arbitrators who had already resigned, requesting the arbitral tribunal consisting of nine persons to proceed with the matter. He requested that if some nominees on the Arbitral Tribunal do not wish to proceed with the matter then they should indicate the same to the parties. It is pertinent to note that the Respondent No.1 was already informed by letter dated 10th April, 2003 that two members of the arbitral tribunal Mr.F.S. Broacha and Mr.Bhupendra Shah have already resigned. But he did nothing. In this background the nominee of the Respondent No.1 on the

arbitral tribunal Mr.Gautam Ashra on 13-9-2004 addressed a letter to eight persons, seven of whom were members of the arbitral tribunal, but the eight namely Mr.K.G.Narang who is shown as one of the arbitrator was not admittedly an arbitrator in this matter. This letter is signed by the nominee of the Respondent No.1 on the arbitral tribunal. The letter reads as under:-

> This has reference to letters dated 09.08.2004 and 09.09.2004 of Mr.Y.N.Thakkar-Applicant in the above matter. To enable the Arbitral Tribunal (AT) to proceed in accordance with the Act, I hereby fix a meeting of the AT at my office on 30.09.2004 at 5.30 p.m.

2. Now, it is clear that even according to this letter the arbitral tribunal was not fully constituted and really speaking therefore there is no justification for the nominee of the Respondent No.1 convening a meeting of the arbitral tribunal. It appears that on 30th September, 2004 except the nominee of the Respondent No.1 nobody remained

present on the appointed place and time and therefore the nominee of the Respondent No.1 addressed a letter dated 4-10-2004 to all the partners except the Respondent No.1. That letter reads as under:-

> "This has reference to my letter dated 13-09-2004. As the other members of the Arbitral Tribunal (AT) have failed to act their mandate is hereby terminated in terms of section 14(a) of the Act. Consequently you are required to appoint a substitute Arbitrator in terms of Section 15(2) of the Act.
>
> Kindly appoint a Arbitrator within 30 days of the receipt of this letter failing which the AT will proceed as per law."

3. Thus, according to nominee of the Respondent No.1 on the arbitral tribunal because six others arbitrators did not attend the meeting which was called by the nominee of the Respondent No.1 on 30th September, 2004 their mandate stood terminated

because of the provisions of Section 14(a). Perusal of Section 14(a) of the Arbitration & Conciliation Act shows that it lays down that the mandate of the arbitrator shall terminate if he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay. Sub-section 2 of Section 14 lays down that if there is any controversy as to whether the mandate of an arbitrator stands terminated under clause (a) of sub-section (1), a party concerned, in the absence of any agreement between the parties, apply to the Court to decide on the termination of the mandate. It is clear that the co-arbitrator can not hold that the mandate of the other arbitrators stands terminated. Therefore, this letter dated 4-10-2004 from the nominee of the Respondent No.1 on the arbitral tribunal was totally beyond his authority and the nominee of the Respondent No.1 was clearly acting in defiance of the law and was terming himself as sole arbitrator. By letter dated 1st November, 2004 addressed to the nominee of the Respondent No.1 Mr.Gautam Ashra by some of the Petitioners, it was pointed out that his act of terminating the mandate of the other arbitrators is totally unauthorised. It appears that Mr.Ashra the

nominee of the Respondent No.1 assumed the jurisdiction now as a sole arbitrator and made the award which is dated 16-12-2004.

4. It is clear from what has been narrated above that in no case the nominee of the Respondent No.1 could have assumed the jurisdiction as the sole arbitrator. In any case the Respondent No.1, who is the beneficiary of the award is not able to point out any provisions under the Arbitration & Conciliation Act whereunder his nominee could have assumed the jurisdiction as the sole arbitrator and made the award. To say the least, the award made by the nominee of the Respondent No.1 is completely unauthorised. In the process of making the award as the sole arbitrator, the nominee of the Respondent No.1 has made a mockery of the provisions of the Arbitration & Conciliation Act and has reduced the entire arbitration proceeding to a farce. In my opinion, therefore, not only the award made by the nominee of the Respondent No.1 on the arbitral tribunal is liable to be set aside, but in my opinion, exemplary costs are also liable to be imposed on the Respondent No.1. Respondent No.1 who appears in person, when I put it to him that I

propose to impose exemplary costs on him, submitted before me that the award has been made by his arbitrator for which he cannot be blamed. In my opinion, submission has no substance. The nominee of the Respondent No.1 on the arbitral tribunal has acted in a manner in which he has acted, obviously, to favour the Respondent No.1. The sole beneficiary of the award is the Respondent No.1. Therefore, it is clear that the nominee of the Respondent No.1 has acted in such a manner at the behest of the Respondent No.1 and therefore, in my opinion, to maintain sanctity of process of arbitration and to make it known that nobody can make mockery of the process by acting in a manner in which the nominee of the Respondent No.1 has acted, in my opinion, exemplary costs will have to be imposed on the Respondent No.1.

5. In the result, therefore, the petition is allowed. The award impugned in the petition is set aside. The Respondent No.1 is directed to pay, as and by way of costs of this petition, Rs.50,000/- to the Petitioners.

...

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O.O.C.J.

ARBITRATION PETITION NO.134 OF 2005

AND

ARBITRATION PETITION NO.135 OF 2005

...

Jayesh M. Gandhi & Ors. ...Petitioners

v/s.

Yogendra N. Thakkar & Ors. ...Respondents

...

AND

ARBITRATION PETITION NO.50 OF 2005

..

A.R.Gandhi & ors. ...Petitioners

v/s.

Y.N.Thakkar & Ors. ...Respondents

...

Mr.K.D.Parikh with Ms.Alphana Ghone i/b Kanga & Co. for the Petitioners.

Respondent No.1 in person.

...

CORAM: D.K.DESHMUKH, J.

DATED: 25TH OCTOBER,2005

P.C.:

The learned Counsel appearing for the Petitioners and the Respondent No.1, who appears in person, are agreed that the facts and law involved in these petitions are similar or identical to the facts and law involved in Arbitration Petition No.133 of 2005. Therefore, for the reasons disclosed in my judgment in Arbitration Petition No.133 of 2005 dated 25th October, 2005, these petitions are allowed. Award impugned in the petitions are set aside. The Respondent No.1 is directed to pay, as and by way of costs, Rs.50,000/- in each Petition to the

Petitioners.

...